IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 15 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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TAPUBHAI RAVATBHAI KATHI - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :
MR AD SHAH for Appellant(s) : 1 - 5.
Mr.R.C.Kodekar, APP for Opponent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH

Date : 07/02/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. The appellants have challenged their conviction under Section 302 read with section 149, 147, 148 of the I.P.Code as well as thesentence of imprisonment for life in respect of offence under Section302 read with Section 149 and imprisonment for a period of one year in respect of the offence under secs.147 and 148, IPC and to pay fine of Rs.3000/-each, in default, further imprisonment for a period of three months. The appellant no.2 has also challenged his further conviction under Section 506(2) of the Indian Penal Code as well as the sentence of imprisonment for a further period of one year and fine of Rs.100/-,in default, further imprisonment for a period of three months recorded by the learned Sessions Judge, Ahmedabad (Rural) in Sessions Case no.24 of 1997, in the present appeal which is filed under Section 374(2) of the Code of Criminal Procedure, 1973

2. The prosoecution case, in a nutshell, can be stated as follows:

2.1 The incident in question is alleged to have taken place at the field of Laghdirbhai Danabhai situated at Nagalka Road in sim of village Sanganpur, Tal. Dhandhuka on 27th September, 1996 at about 4.30 a.m. According to the prosecution version, the appellant no.1 armed with a spear, the appellant no.2 armed with a gun, the appelant no.3 and 4 armed with axe and the accused no.5 armed with dharia had on the said date and time unlawfully assembled in the said field with a common object of committing murder of deceased Aalubhai Jilubhai which was three fields away from the field of the deceased and caused several injuries to deceased Aalubhai Jilubhai on various parts of the body. At that time, hearing some rowdy commotion, the complainant Jilubha (PW 1) and his son Mansi (PW 3) rushed to the spot from their own field and they saw all the accused persons beating Alubha whereupon the appellant no.2-Shantubhai stopped them at the point of gun. In the meantime, on account of the beating by the appellants-accused, deceased Aalubhai fell down and the appellants-accused fled away. Thereafter, Mansi, took the deceased to the hospital in a chakada

rickshaw, however , since the Doctor was not present there, they left for Limdi hospital and while on their way to Limdi hospital the deceased Aalubhai had expired. At Limdi hospital the doctor who examined Aalubhai declared him dead. The on duty Police Officer, Limidi Hospital Shri Ashokkumar on receiving a Vardi from Police Station Officer, Limdi Police Station on 27-9-1996 at about 7.30 a.m. for going to hospital in connection with the dead body of a person brought to the hospital, went to the hospital and after seeing the dead body he collected details from Jilubhai, PW 1 who happens to be the father of the deceased. Ashokkumar PW 8 then prepared the inquest Panchnama of the dead body (exh.18) and the complaint as given by Jilubhai was also reduced into writing. Thereafter, he sent the complaint to Limbdi Police Station alongwith the inquest Panchnama for its registration and also forwarded the dead body for post mortem. However, since the offence in question was of the jurisdiction of Ranpur Police Station, Shri Ranabhai Vaghela of Limbdi Police Station registered the complaint on 27-9-1996 and forwarded the same alongwith inquest Panchnama to Ranpur Police

Station. The PSI Ranpur Police Station Mr. Bharatsinh Vaghela on receiving the said complaint on 27-9-96 at about 2.00 p.m. registered the offence and commenced investigation. During the course of investigation, the Investigating Officer drew the Panchnama of the scene of offence, recorded statements of witnesses and the accused persons came to be arrested on 1-10-1996. Thereafter, Panchnama of the physical condition of the accused were made (Exh.27), weapons were recovered under a discovery Panchnama (Exh.34). The clothes worn by the accused Ranubhai were also seized under a Panchnama.The Muddamal articles and the bloodstained earth and control earth were then sent to the Chemcial Analysis and reports Exhs.31 and 32 were received. At the conclusion of the investigation, the appellants were chargesheeted and chargesheet was submitted in the Court of learned J.M.F.C., Dhandhuka for the offences punishable under Sections 302 read with Section149, 506(2) and also under Sections 135(1) read with sec.135(1)(d) of the Bombay Police Act. The accused no.1 was also chargesheeted for an offence punishable under sec.30 of the Arms

Act. As the offences in question were exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Sessions Court at Ahmedabad Rural for trial where it was numbered as Sessions Case no.24 of 1997. The learned Sessions Judge framed charge against the accused for the alleged offences. The charge was read over and explained to the appellants who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined as many as eleven witnesses and also produced documentary evidence such as complaint, postmortem note, panchnama of the scene of offence and the discovery Panchnama by virtue of the disclosure statement given by the accused. After recording of the evidence of prosecution witnesses was over, the learned Judge recorded the statement of the appellant-accused under Section 313 of the Criminal Procedure Code. In their further statement, the appelllants-accused denied the case of the prosecution and stated that they have been falsely implicated in the commission of the crime.

After hearing the learned Counsel for the respective parties,

and on appreciation of the evidence adduced by the prosecution, the learned Sessions Judge passed the judgment and order of conviction and sentence as stated in paragraph 1 of this judgment, giving rise to the present appeal.

3. Mr.A.D.Shah, learned Counsel for the appellants has firstly submitted that the medical evidence does not support the case of the prosecution inasmuch as the injuries sustained by the deceased are not possible by Muddamal weapons, and therefore the learned Judge has committed an error in holding that the accused persons have committed the murder of deceased Aalubhai by using the Muddammal weapons. Scrutinising the evidence of the Doctor we find two conflicting versions one in favour of the accused and the other in favour of the prosecution in chief examination and cross examination respectively, and therefore, the testimony of this witness cannot be relied upon as it lacks truthfulness. At the same time, if we look at the evidence of Jilubhai(PW. 1) and Mansi (PW 3), we find the same to be consistent in all respects when they say

that when they reached the scene of offence on hearing the rowdy commotion they saw accused no.1Tapubhai armed with spear, accused no.2 armed with a gun, accused nos.3 and 4 Ranubhai and Babubhai armed with axe, and accused no.5 Bhupatbhai armed with dharia jointly assaulting the deceased Aalubhai with their respective weapons. Moreover, the evidence of PW.1 is also found to be fully corroborating the statement made by him in the F.I.R. Thus, the credible, trustworty and direct evidence of Jilubhai and Mansi who are eye witnesses cannot be thrown out of consideration merely because they are relatives. Reference in this connection may be had to the decision rendered in the case of (i) ***State of U.P. v. Krishna Gopal and another (AIR 1988 SC 2154, Para 13) and (ii)Ravi Kumar v. State of Punjab ((2005) 9 SCC 315: AIR 2005 SC 1929, Para-18)***.This submission of Mr. A.D.Shah for appellant, therefore does not merit acceptance.

4. The learned Counsel next submitted that the formation of an unlawful assembly by all the five accused persons with the common object of committing murder of the deceased is highly unnatural. It has come out in the evidence of Jilubhai (PW 1) that some quarrel

had taken place between them and the accused persons for which a complaint had also been lodged by Shantubhai-accused no.2 against Aalubhai and one Bhabhalu. We feel that even if there was a quarrel of trivial nature, certainly enmity would prevail and therefore, it can safely be inferred that on account of such enmity the accused persons might have attacked Aalubhai. This fact lends corroboation to the evidence of prosecution witnesses as far as motive is concerned, and once the motive is established it cannot be said by any stretch of imagination that there was no formation of unlawful assembly as canvassed before us by the learned Counsel for the appellants-accused. This submission therefore, is also not worthy of acceptance.

5. The learned Counsel next contended that the evidence of the complainant-Jilubhai stands contradicted by the evidence of Mansi with regard to presence of Bhopali at the scene of offence and he having helped in lifting the deceased to place him in the Chakada rickshaw. According to the learned Counsel, non-examination of such independent witness by the prosoecution is fatal to the case of

the prosecution. P.W.1 in his evidence has categorically stated that the said Bhopali arrived at the scene of offence after the accused had run away, and therfore, it is quite certain that he could not have seen the incident, and therefore, no direct evidence would have been possible even if this witness was examined. That being so, the question of non examination of this witness being fatal to the case of the prosoecution loses its significance. Even otherwise, minor contradictions in the evidence of these eye witnesses are bound to occur as at that time they might have been in great shock and in a hurry to shift the deceased to the hospital. and the submission of the learned Counsel in this respect stands raised to the ground.

6. The learned Counsel next submitted that except injury nos.3 and 13 all other injuries are simple and superficial injures, and therefore, it cannot be said that the common object of the appellants-accused could have been to commit murder of the deceased Aalubhai. According to the learned Counsel the learned Judge has erred in explaining the absence of corresponding cut marks. It is imporant to note that on internal examination the Doctor who

conducted the autopsy found that occipital bone of the skull to the left side was fractured and intracraenal haemorrhage was found in the brain and that death occurred owing to cardio respiratory failure due to shock due to intracraenal haemorrhage resulting from the said fracture. This fracture corresponds to injury no.3 C.L.W. over left side occipital region. The Doctor has clearly opined that this injury was sufficient in the ordinary course of nature to cause death and that the injuries sustained by the deceased Aalubhai were caused by Muddammal weapons. As discussed hereinabove, the appellants-accused have used deadly weapons in the commission of the crime, and therefore, the common intention to kill the deceased stands proved beyond reasonable doubt. Now, with regard to the absence of cuts marks on the pant and shirt worn by the deceased, we are of the view that there is all possibility that the deceased might have folded the pant and the sleeves of the shirt in such a way that the cut marks could not have appeared on them. It is also equally possible that when he was assaulted by all the five accused persons the shirt and the pant would have swayed or moved in such a way that cut marks

could not have appeared on them. This submission of the learned Counsel would, therefore, be of no help to him.

7. The learned Counsel for the appellants-accused next submitted that the prosoecution witnesses nos.1 and 3 had not stated with certainty as to on which part of the body of the deceased who caused injuries and by which weapon. This limb of argument taken by the learned Counsel for the appellant does not stand to good reasoning as when all the five accused persons had dealt blows with their respective weapons it is not humanly possible to say as to whose blow would land on which part of the body and by which weapon, however, it is important to note that the witnesses have mentioned the names of the weapons held by each of the appellants-accused. Reference in this connection may beneficially be had to the decision rendered by the Honourable Supreme Court in the case of **Kallu alias Masih & Ors v. The State of Madhya Pradhes , reported in (2006 AIR SCW 177,** wherein it has been held that failure of eye witnesses to name all who gave blows and exact nature of injury caused cannot be a ground to disbelieve them.

8. The learned Counsel next contended that the learned Judge has erred in holding that the rowdy commotion at the scene of offence had been heard by the complainant-Jilubhai and Mansi from a long distance or that they had seen the incident as according to the complainant himself in his evidence work of watering the crop in their field was in progress and the electric motor was on at that time. PW 1 Jilubhai in his evidence has specifically stated that the day of incident was the last day of a bright half of a lunar month i.e. Punam; that there was sufficient moonlight at the time of incident and that it was a calm and peaceful night. They have also stated that their field is three fields away from the field of Laghdirbhai where the incident took place and that the distance between these two fields might be 400 to 500 steps. We find no reason to disbelieve the testimony of these two eye witnesses, for the simple reason that the exact distance between the two fields is not on record and there is no evidence on record to the contrary. In such situation we hold that the witnesses could have very well heard and even identified the accused persons as they were known to each other, more

particularly, keeping in view the time factor of the incident being 4.30 a.m.

9. The learned Counsel next contended that it is highly improbable that the accused persons who intended to assault with deadly weapons at night would make any noise so as to make their presence felt. This submission of the learned Counsel for the appellant cannot be accepted even for a moment since each individual would respond to a given situation in a different manner and there cannot be any straight jacket formula in respect of the same.

10. The learned Counsel for the appellants-accused next contended that the death of the deceased Aalubhai could not have occurred at 4.30 a.m. as according to the Doctor rigor mortis was present when he examined the dead body of the deceased. It is true that normally rigor mortis commences after 1 to 2 hours after the death and the entire body gets stiffened within 5 to six hours but the definite time since death cannot be estimated with the aid of the time

of commencement of rigor morits. The speed of onset of rigor mortis depends on many factors and this speed is delayed indefinitely in cold conditions, and therefore, the say of the eye witnesses that the deceased died after 5.00 to 5.30 a.m. cannot be labelled as untrue. We, therefore, do not find any force in this submission of the learned Counsel for the appellant-accused.

11. No other contentions have been raised by the learned Counsel for the appellants-accused.

12. Learned A.P.P. Mr. R.C.Kodekar has supported the judgment of the trial Court in toto.

13. On a careful consideration of the entire evidence, and the arguments advanced by the learned Counsel for the respective parties which we have dealt with hereinabove, we find that the trial Court was justified in convicting the appellants- accused, as the appellants five in number armed with deadly weapons, as discussed hereinabove, assaulted the deceased Aalubhai. Not only that one of them Shantubhai prevented the eyewitnesses Jilubhai (PW 1) and Mansi (PW 3) from saving the deceased by holding them at gun

point and threatening to kill them. We have therefore no hesitation in holding that the appellants-accused had formed an unlawful assembly with the common object of committing murder of the deceased Aalubhai and had committed the offence of murder.

14. We have critically analysed the evidence on record on the basis of the material placed before us and for the reasons as discussed above, we are of the opinion that the learned trial Judge has correctly appreciated the evidence and delivered an elaborate and well reasoned judgment discussing all the aspects of the matter and arrived at a just and legal conclusion in convicting the appellants- accused.

15. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellants-accused had committed the murder of the deceased Aalubhai and there is no merit in the appeal.

16. For the foregoing reasons, the appeal fails and is dismissed. During the pendency of the appeal, the appellant no.1 is on bail. His bail bonds shall stand cancelled. The appellant no.1 shall surrender

to the jail authorities within 15 days from today. Muddammal articles to be disposed of in terms of the directions given in the impugned judgment.

(R.P.Dholakia,J.)

(M.D.Shah,J.)

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